Supreme Court, U.S.
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No. 94-490

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S SUPPLEMENTAL BRIEF

RICHARD D. MARKS
Counsel of Record
TODD D. GRAY
ELISA P. ROSEN
DOW, LOHNES & ALBERTSON
1255 Twenty-Third St., N.W.
Washington, D.C. 20037
(202) 857-2565
Counsel for Petitioner

November 4, 1994

18 pp

On October 28, 1994, Robert E. Days, the Libertarian Party Candidate for the U.S. Senate in Nevada, filed an action in United States District Court for the District of Nevada against the public television station in Las Vegas, Nevada, KLVX-TV, and against certain individuals employed by the school district to which the station is licensed. (App. 1a).[1/] Among other things, the suit alleges that the school district deprived Mr. Days of his rights under the First Amendment to the U.S. Constitution, because it did not invite him to a debate between the major party candidates for the Senate (App. 8a). Mr. Days seeks declaratory and injunctive relief, and damages in excess of $3,000,000.00 (App. 13a).

Mr. Days describes KLVX-TV as "[a] public access television station" (App. 6a), and describes himself as "a member of the class sought to be protected by [47 U.S.C. §315, the "equal opportunities" provision of the Communications Act of 1934, as amended]" (App. 12a).[2/] Mr. Days alleges that the Republican candidate for Senator, Hal Furman, "used his influence as a major party candidate to coerce the other Defendants to deny Plaintiff his Right of Speech [*sic*] and Due Process by refusing to appear on any broadcast debate unless Days was excluded." (App. 5a.)

In our petition, we described the likely adverse effects of the Eighth Circuit's opinion below upon state public television and radio licensees that seek to hold debates among major party candidates, as permitted under Section

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[1/]Counsel for Petitioner learned of the filing of this complaint at approximately 4:45 p.m. on Thursday, November 3, 1994.

[2/]*See* Opp. Br. at 12, 14-17.

315 and agency and court cases interpreting "equal opportunities."[3/] Mr. Days' action, filed eleven days before election day, illustrates that AETC's fears are real. If lawsuits such as Mr. Days' -- which are barred under *Chandler v. Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991) -- succeed under the Eighth Circuit's new doctrine, state licensees of public television and radio stations will at the least be forced to alter their coverage of political debates, contrary to Congress' intent.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

RICHARD D. MARKS
Counsel of Record
TODD D. GRAY
ELISA P. ROSEN
DOW, LOHNES &
ALBERTSON
1255 Twenty-Third St.,
N.W.
Washington, D.C. 20037
(202) 857-2565

Counsel for Petitioner

November 4, 1994

[3/]Pet. at 27-28.

APPENDIX

Robert E. Days aka Bob Days
225 Lana Ave. #3A
Las Vegas, NV 89109
(702) 893-1256
For Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-94-00921-HDM (LRL)

ROBERT E. DAYS aka BOB DAYS	)	
Plaintiff	)	
-vs-	)	COMPLAINT FOR
DR. BRIAN CRAM, Individually TOM AXTELL, Individually LEE WINSTON, Individually HAL FURMAN, Individually KLVX-TV Channel 10 FEDERAL COMMUNICATIONS COMMISSION DOES 1-50 INCLUSIVE	)	1. CIVIL RIGHTS VIOLATION 28 U.S.C. 1343 42 U.S.C. 1983 U.S.C. AMENDMENTS 1,14 2. DECLATORY RELIEF 28 U.S.C. 2201 3. FEDERAL QUESTION JURISDICTION 28 U.S.C. 1331
Defendants	)	DEMAND FOR JURY TRIAL

ALLEGATIONS COMMON TO ALL COUNTS

JURISDICTION

I

Jurisdiction is founded on TITLE 28 U.S.C. 1343 which allows for an action to recover for injuries based upon deprivation of civil rights under color of state law or authority. TITLE 42 U.S.C. 1983 provides for a cause of action to redress civil rights injuries based upon deprevation [sic] of those rights, amendments 1 and 14, further provide causes of action for redress, these causes of action stem from an intentional denial of First Amendment rights of free speech by employees of a state chartered and operated institution. A public access television station and the obstruction of that right by a political candidate acting in open consort and along with public employees.

II

Jurisdiction is further provided by 28 U.S.C. 2201 as this is an action for Declatory relief regarding an actual controversy now existing between the parties. Plaintiff seeks judgement of the Federal District Court adjudicating the rights duties and obligations of the respective parties

III

Jurisdiction is further founded at 28 U.S.C. 1331 in that there is a federal question of the F.C.C.'s obligaation [sic] to enforce 47 U.S.C. 315, and resulting injury to plaintiff which exceeds $50,000 by the federal agency;s [sic] failure to enforce the law as enacted by congress [sic].

IV

Defendants Brian Cram, Tom Axtell and Lee Winston are employees of the County of Clark School District owned Television Station KLVX-TV (10). They are all residents of the County of Clark and the State of Nevada.

V

That the defendant Hal Furman is a candidate for public office who using his party influence and position conspired with the state employees to deny Plaintiff his right to participate in open and televised debates between the candidates.

VI

Plaintiff Bob Days resides in the County of Clark, State of Nevada, he is a candidate of public office, United States Senate and the party nominee of the Libertarian Party.

COMMON FACTS

VII

On or about June 30, 1994 Robert E. "Bob" Days (Hereinafter referred to as Days) filed as a candidate for the United States Senate with the Secretary of State of the State of Nevada.

VIII

On or about July 1, 1994 Days filed with the Federal Election Commission in Washington, D.C.

IX

On or about September 7, 1994 Days requested by letter addressed to Channel 10, KLVX-TV to participate [sic] in any debates between the candidates.

X

On or about September 14 1994 Days received a letter from Lee Winston, Station News/Community Affairs Manager for KLVX-10 which denied his request. Mr. Winston acknowledged that he was responding to the letter at the request of Mr. Tom Axtell, Manager of the station.

XI

On or about October 10, 1994 Days wrote a letter to Dr. Brian Cram, Superintendent of the Clark County School District (the county holds the station license) regarding his request to participate in the debate. Mr. Cram refused to allow Days to participate.

XII

On or about October 14, 1994 Days received a telephone call from Tom Axtell at which time Axtell advised Days that Hal Furman would not allow Days to participate in any debate and that on that basis Days would be excluded.

XIII

That the Defendants Dr. Brian Cram, Tom Axtell and Lee Winston acted in their official capacities as employees of the County of Clark and under color of their office to deny Plaintiff his right to debate the other two candidates

that this conduct denied Plaintiff a substantial right of speech and due process.

XIV

That Defendant Hal Furman is the Republican candidate for the United States Senate who used his influence as a major party candidate to coerce the other Defendants to deny Plaintiff his Right of Speech and Due Process by refusing to appear on any broadcast debate unless Days was excluded.

XV

That KLVX-TV (10) is a Licensee within the meaning of 47 USC 315 is currently licensee and was a licensee by and of the F.C.C. at all times relevant as a television broadcast station. That the reference [sic] statute requires by law that the station provide "equal opportunities" to all legally qualified candidates for public office. That Days is a legally qualified candidate for public office and at all times relevant was so qualified and was denied the equal opportunity of participation in the public debate.

XVI

That Days complained to the F.C.C. but was informed by an employee of the F.C.C. that they had no intent in pursuing such claims.

XVII

That Days has exhausted all of his available administrative remedies available to him, even though such exhaustion of remedies is not required for civil rights violations.

XVIII

That a Federal Question has arisen as to the obligations and duties of the F.C.C. to enforce by appropriate means the provision of 47 USC 315 and damages to Plaintiff by the agency is failure to enforce a valid law of congress [sic].

XIX

That a Federal Question has arisen by virtue of 47 USC 315 in regards to whether a broadcaster licensee must provide "Equal Opportunities" to legally qualified candidates for public office.

XX

That Defendant KLVX-TV is a public access television station owned and operated by the Clark County School District which has denied Plaintiff to "Equal Opportunities" to debate similarly situated candidates.

XXI

That the Federal Communications Commission hereinbefore and after the F.C.C. is a federal agency charged with the responsibilities of enforcing the Federal Communications rules and regulations as enacted by statutes found at 47 USC and regulation found at 47 C.F.R. and that the agency is hereinafter made a party for its refusal to enforce 47 USC 315.

XXII

That Plaintiff has no knowledge of the true names or capacities of the DOE Defendants, the said DOE Defendants however are believed to be employees, agents,

representatives and or co-conspirators of KLVX-TV (10) and or the F.C.C. who acted for and on behalf of the other named defendants in open consort with and as agents of each or any of the other named Defendants, that Plaintiff will amend this complaint to incorporate them by name when the same has been ascertained.

FIRST CAUSE OF ACTION

CIVIL RIGHTS VIOLATIONS

BRIAN CRAM, TOM AXTELL

LEE WINSTON AND HAL FURMAN

XXIII

Plaintiff realleges and incorporates by reference paragraphs 1-22 as though the same have been fully set forth hereat.

XXIV

That KLVX-TV (10) is a public television station, owned and operated by the Clark County School District that as such is an open access station open not only to the public but especially open to political candidates. The United States Congress especially mandated by virtue of 42 USC 1983 that candidates for public office will have equal opportunities to broadcast political views and to speak to the public.

XXV

That KLVX-TV (10) provided broadcast time for the United States Senate Candidates Hal Furman and Richard Bryan but excluded Bob Days from participation in debates even though Days was a legally ballot qualified candidate and eventhough [sic] Days had made repeated requests for his right to participate.

XXVI

That the Defendants as employees of the County of Clark, a division of the State of Nevada and under the color of their respective offices each acting alone and in open concert with the other, intentionally excluded Plaintiff in the broadcast debates between the political candidates.

XXVII

That by the said exclusion Days was denied the Right to Speak by both the authority and interference of a state owned facility and its employees acting together with a political candidate. Days was further denied substantive Due Process in that there is no right to be heard and defend, or any procedure established by the county owned facility to protect Days [sic] right to speak against such arbitrary exclusion.

XXVIII

That the Defendants and each of them acted in bad faith and with malicious intent with the purpose and motive of oppressing Plaintiff in his Right to Speak and participate when they either knew or should have known the requirements of 47 USC 315 since they were in a

management position with a federally licensed broadcast station.

XXIX

That the bad faith and malicious intent was to silence opposition to the views of Hal Furman one of the major political candidates who appeared on the televised and advertised debates.

XXX

That the conduct of the Defendants and each of them was oppressive and malicious and that Plaintiff is entitled under Nevada Law to punitive damages of Three Hundred Thousand Dollars ($300,000.00).

XXXI

That Plaintiff is entitled to be compensated for the loss of economic advantage bestowed upon the other candidates which is estimated to be ($100,000.00) One Hundred Thousand Dollars or more based upon the audience share and cost of reaching said audience share.

SECOND CAUSE OF ACTION

DECLARATORY RELIEF

ALL PARTIES

XXXII

Plaintiff realleges paragraphs 1-31 and incorporates the same as though fully set forth hereat.

XXXIII

That there exist an actual controversy between the various parties as to their legal rights, duties and obligations.

A.) KLVX-TV (10) believes it has no responsibility to allow all qualified candidates "equal opportunities" to present their views to the public.

B.) The F.C.C. believes it has no obligation to enforce 42 USC 1983 as enacted by congress [sic].

C.) Brian Cram, Tom Axtell, Lee Winston and Hal Furman believe they have no obligation to allow free speech over state controlled airways and equal opportunities with the other legal candidates to express his views in open and invited debate.

XXXV

Plaintiff further believes that 47 USC 315 is applicable to KLVX-TV (10) and controls their conduct and actions.

XXXVI

Plaintiff further believes that the F.C.C. has a statutory mandate to insure that political candidates are protected from arbitrary denials of access to the media licensee's [sic] by virtue of 47 USC 315 and that the F.C.C. has a duty to enforce the statute.

XXXVII

That Plaintiff prays the court for its Declatory [sic] Judgement as to the Duties and Rights and other legal

remedies and relations of the parties and for other relief as may be proper.

THIRD CAUSE OF ACTION

BREACH OF STATUTORY DUTY

(Negligence per se)

ALL PARTIES EXCEPT THE F.C.C. AND HAL FURMAN

XXXVIII

Plaintiff realleges and incorporates paragraphs 1-37 as though fully set forth hereat.

XXXIX

That the language of 47 USC 315 is clear and unambiguous and further prescribes a duty of care imposed upon a licensed broadcaster they [sic] are to provide "Equal Opportunities" to political candidates running for the same office.

XXXX

That the legislation was enacted to achieve the following purposes; 1.) to provide an equal forum for political speech where candidates can not be discriminated against. 2.) to protect the Right of Speech for minority views and candidates.

XXXXI

That Plaintiff is a member of the class sought to be protected by the statute and that the Defendants in clear violation of the statute denied the Plaintiff his Right to participate in the invited debates.

XXXXII

That Plaintiff has been injured by the denial of access to the public and the costs of reaching the audience and in participation of an open and enlightening debate.

XXXXIII

That 47 USC 315 imposes a Duty of Care upon the Defendant [sic], but that they breached the Duty of Care. That the said breach of Duty was the direct and proximate cause of the injuries sustained by Plaintiff.

XXXXIV

That Plaintiff has been damaged therby [sic] in an amount equal to the economic advantage provided to Hal Furman and Richard Bryan which is anticipated to be in excess of $100,000.00 and believed to be $3,000,000.00.

WHEREFORE, Plaintiff prays judgement against Defendants and Each of them as follows

FIRST CAUSE OF ACTION

CIVIL RIGHTS

1. For actual damages subject to proof at the time of trial but believed to be in excess of $100,000.00 and believed to be $3,000,000.00.

2. For exemplary damages of $300,000.00 and believed to be $3,000,000.00.

SECOND CAUSE OF ACTION

DECLARATORY RELIEF

1. For a mandatory Injunction Requiring the Defendants to obey the clear language of 47 USC 315.

THIRD CAUSE OF ACTION

NEGLIGENCE PER SE

1. Actual damages subject to proof at the time of trial anticipated to be in excess of $100,000.00 and believed to be $3,000,000.00.

FOR ALL CAUSES OF ACTION

1. Cost of suit.

2. Attorneys fees as may be appropriate.

3. For any other relief as the court may deem just and proper.

Dated This 28 Day of October, 1994

/s/ Robert E. Days
ROBERT E. DAYS